**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies | ) | WT Docket No. 13-238 |
| | ) | |
| Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting | ) | MB Docket No. 07-18 |

# COMMENTS OF THE DISTRICT OF COLUMBIA

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**February 3, 2014**

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## COMMENTS OF THE DISTRICT OF COLUMBIA

The District of Columbia (the "District") respectfully submits these comments in response to the Federal Communications Commission (FCC)'s *Notice of Proposed Rulemaking* (*NPRM*) in the above captioned proceeding. The *NPRM* is part of the FCC's overall effort to expand the availability of broadband capabilities and is a response to industry allegations that state and local zoning and land use requirements are acting as impediments to the rapid deployment of wireless broadband facilities. In the *NPRM* the Commission seeks comment on a number of proposals aimed at clarifying and implementing federal statutory provisions governing State and local review of wireless siting proposals.

As discussed below, the District urges the Commission to refrain from adopting regulations at this time and to allow State and local government entities the flexibility to develop and implement solutions that best meet the needs of their individual communities consistent with the requirements of federal law. The Commission should at this time continue to focus on

facilitating the development of collaborative best-practice processes between State and local governments and wireless providers. To the extent the Commission believes itself compelled to adopt specific implementing rules to clarify the intent of Congress, the Commission should do so in the narrowest possible fashion, and refrain from expanding federal preemption in areas of traditional State and local government authority.

## I. INTRODUCTION

### A. The District Supports Broadband Deployment

The District of Columbia is at the forefront of broadband adoption in the United States. The District has at least fifteen broadband providers serving the District[1] and broadband consumption and use is among the highest in the nation.[2] These broadband providers, both wireline and wireless, actively seek to expand their capacity due to demand for broadband in the District. To help meet this demand, the District government has committed to providing Wi-Fi, free of charge, in many areas of the District. The District has also developed policies to encourage rapid broadband deployment and adoption in all areas of the District, including streamlined permitting, and the establishment of fair and efficient procedures that are clear, simple, and well-coordinated. The District recognizes that broadband adoption and use makes its community more competitive, facilitates economic development, and improves the delivery of government services. Thus, the District has demonstrated, through its policies, that it shares the Commission's desire to accelerate the pace of broadband deployment, adoption, and use.

The District, through its Office of the Chief Technology Officer (OCTO), owns and operates DC-Net, a facilities-based high-bandwidth Metropolitan Area Network that spans the District of Columbia, providing a full suite of managed, interconnection, and transport services

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1 *See* District Broadband Map http://broadband.dcgis.dc.gov/DCmap.html

2 *See* http://www.akamai.com/dl/documents/akamai_soti_q213.pdf?WT.mc_id=soti_Q213

to government and public-services organizations throughout the City. DC-Net has deployed over 500 miles of fiber within the District. In 2011, OCTO was awarded a $17.5 million stimulus grant under the federal Broadband Technology Opportunities Program for the construction and operation of a middle-mile fiber network administered by DC-Net.[3] The DC Community Access Network (DC-CAN) delivers affordable, value-added broadband services to health, educational, public safety, and other Community Anchor Institutions in the city's economically distressed areas. It also creates points of interconnection and provides middle-mile services to last-mile service providers that deliver affordable broadband access to residents and businesses in these areas. On February 15, 2012, the Obama Administration heralded the DC-CAN and OCTO as a "Champion of Change." In the White House event, Assistant Secretary of Commerce Larry Strickling recognized DC-Net's first-in-the-nation 100 gigabits per second, open-access broadband network.

Therefore, the District respectfully request that the Commission view the District of Columbia as a jurisdiction where broadband deployment adoption is rapidly occurring and refrain from taking any action that would disrupt these efforts.

### B. The District Has Unique Attributes That Necessitate Extra Care in Making Zoning and Land Use Decisions

While the District has a strong desire and commitment to facilitate rapid deployment of broadband throughout the City, it also has an obligation to balance multiple competing interests in establishing polices for use of public rights-of-way and private property subject to land use zoning. As the nation's capital, the District faces unique challenges in preserving our national history, protecting and promoting public safety, and ensuring national security. Accordingly, zoning and land use policy necessitates extra care on the part of the District and is not amenable

[3] The BTOP stimulus program was established by the American Recovery and Reinvestment Act of 2009.

to one-size-fits-all regulation that does not account for the interplay of these unique characteristics.

Moreover, the District is subject to distinct federal regulations and criteria governing construction activities limiting the height and size of facilities. For example, the Height of Buildings Act of 1910 (DC § 6-601) effectively limits the heights of any type of building or structure in the District to no higher than to 130 feet, or the width of the right-of-way of the street or avenue on which a building fronts, whichever is shorter. In addition, construction activities within the District of Columbia are governed by a combination of District zoning and land use authority, myriad federal agencies working through the National Capital Planning Commission, and federally chartered historical commissions that possess their own review boards.[4]

The unique, historical position of the District necessitates a balance between the preservation of our nation's historical buildings and structures and the deployment of advanced technology. The District government has the most experience in striking this balance and respectfully requests that the Commission refrain from implementing rules that would disturb or disrupt this balance.

## II. IMPLEMENTATION OF SECTION 6409(a)

In the *NPRM*, the Commission seeks comment on whether it should promulgate rules implementing and clarifying the requirements of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012. Section 6409(a) provides, in relevant part,

> (a) Facility modifications
> (1) **In general**
> Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104–104) or any other provision of law, a State or local government may not

[4] E.g., see the attached article http://www.thegeorgetowndish.com/thedish/comcast-pulls-boxes-historic-district discussing the role of the Old Georgetown Board, part of the U.S. Commission on Fine Arts, in reviewing the placement of facilities in parts of historic Georgetown.

> deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.
> (2) **Eligible facilities request**
> For purposes of this subsection, the term "eligible facilities request" means any request for modification of an existing wireless tower or base station that involves—
> (A) collocation of new transmission equipment;
> (B) removal of transmission equipment; or
> (C) replacement of transmission equipment.[5]

### A. The Commission Should Defer the Adoption of Preemptive Regulations

The Commission has tentatively concluded that the public interest will be served by clarifying the obligations of State and local governments under Section 6409(a) respecting requests for collocations and modifications of existing wireless towers. The District respectfully disagrees.

First, the District urges the Commission to recognize that there is no evidence in the statutory language or legislative history of Section 6409(a) that Congress intended this provision to be a broad or expansive preemption of traditional State and local zoning and land use management. On its face, Section 6409(a) is simply a finding by Congress that routine requests for a collocation or a modification of an existing lawful wireless installation on a tower should not be denied absent a finding that the proposed collocation or modification has more than a *de minimis* effect on some legitimate local land use policy consideration (esthetics, safety, etc.). Conversely, Section 6409(a) leaves proposed collocations or modifications that would have more than a *de minimis* effect to normal standards and procedures for approving wireless construction and installation. It is the context of this basic fundamental understanding that the Commission must consider any proposed rules, regulations or definitions.

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[5] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 §§ 6409(a)(1) and (2) (codified at 47 U.S.C. §§ 1455(a)(1) and §(2)).

Second, the principles of federalism dictate that, absent a clear and compelling need, the Commission should leave state and local governments free to exercise their traditional or fundamental functions. Zoning and land use regulation is a quintessential State and local government police power. As the FCC's Intergovernmental Advisory Committee observed "state, local and tribal land use authorities are properly recognized as the threshold decisions-makers with respect to whether the standards for Section 6409's applicability are met in particular cases."[6]

Restraint by the Commission is especially appropriate because the Commission lacks the resources and special expertise required to perform the delicate balancing of local interests that zoning and land use regulation requires. Nowhere is this need for balance more apparent than in the communications arena, where land use regulations and policies must be balanced between communications-based priorities and other important public priorities, including health, public safety, property values, and aesthetics. The Commission has no special expertise in these other areas, and has recognized that its "goal is not to operate as a national zoning board."[7] Indeed, given the fact that a proper balancing of priorities may often require evaluation of uniquely local conditions, the FCC is particularly unqualified to make such determinations.

Finally, there is no record of State and local governments being unresponsive to requests for collocations or reasonable modifications of existing towers. Indeed, the Commission's own record indicates the opposite -- the Commission notes that "[c]ollocation is [] commonly encouraged by zoning authorities to reduce the number of new communications towers."[8] The Commission also recognizes on-going "legislative efforts by State and local governments to

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6 IAC Comments at 4.
7 *NPRM*, at ¶ 99.
8 *NPRM*, at ¶ 95.

streamline their collocation review processes in response to Section 6409(a)."[9] Further, the Commission recognizes that substantial progress is being made on the part of State and local interests and industry, to reach consensus on the development of best practices and model ordinances.[10] The Commission should not undercut these efforts by prematurely adopting prescriptive rules. As the Commission notes, this approach would provide State and local governments more opportunity and flexibility to develop solutions that are tailored to meet their communities' needs; that are consistent with statutory provisions; and that help distinguish the issues that require Commission clarification from those on which there is general consensus.[11]

Therefore, the Commission should defer adopting regulations and allow State and local governments to implement Section 6409(a). After they have done so, the Commission should not take further action unless and until substantial evidence emerges of widespread problems that cannot be handled adequately by ordinary processes of judicial review.

**B. Terms in Section 6409(a)**

Section 6409(a)(1) provides that "a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station." The Commission notes that aside from the definition of "eligible facilities request," Section 6409(a) does not define any of its terms. Similarly, neither the definitional section of the Middle Class Tax Relief and Job Creation Act nor that of the Communications Act contains definitions of the key terms of Section 6409(a) terms. The Commission has tentatively concluded that it

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9 *NPRM*, at ¶ 99.

10 In addition, the *NPRM* notes that in 2012, the Wireless Bureau, in cooperation with NATOA, hosted a workshop to "provide an overview of how collocations can promote the availability of mobile broadband, public safety, and other wireless services in a manner consistent with community priorities." *NPRM*, at ¶ 97.

11 *NPRM*, at ¶ 98.

will serve the public interest for the Commission to clarify some of these definitions. If the Commission ultimately finds that adopting definitions for certain terms in Section 6409(a) is necessary, it should do so as narrowly as possible to avoid infringing on the traditional authority of state and local governments.

### 1. Wireless Towers and Base Stations

#### a. A wireless tower refers to a structure built for the primary purpose of attaching antennae

The Commission should define the term "wireless tower" in a way that makes clear that it is a structure built *for the primary purpose* of attaching antennae and other ancillary wireless communications facilities. Such a definition is consistent with the Commission's use of the term in its Antenna Collocation Programmatic Agreement, where "tower" is defined as "any structure built for the sole or primary purpose of supporting FCC-licensed antennae and their associated facilities." 47 C.F.R. Part 1, App. B, § I.B.

The Commission should reject calls to define a wireless tower as *any* structure that has the capability of hosting antennae and other wireless communications facilities -- *e.g.*, a building, water tower or street light pole. In defining the terms in its Programmatic Agreement the Commission specifically indicated that "a water tower, utility tower, or other structure built primarily for a purpose other than supporting FCC-licensed services is not a "tower" for purposes of the Agreement, but is a non-tower structure."[12]

Nor is there anything in the statutory language to suggest that a broader interpretation of the term wireless tower was intended by Congress. Not only are such structures not "towers" in the traditional use of the word, but they are certainly not *wireless* towers. Indeed, the scant legislative history suggests that a narrow interpretation of the term "tower" was intended. The

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[12] FCC Fact Sheet on Antenna Collocation Programmatic Agreement, January 10, 2002, at 4.

Conference Report accompanying the Middle Class Tax Relief and Job Creation Act of 2012 describes the requirement of Section 6409(a) as follows: "Section 4225 would require approval of requests for modification *of cell towers*."[13] The use of the term "cell towers" suggests that Congress only contemplated that the new provision would apply to traditional stand-alone cell towers, and not buildings, light poles, water towers or other structures that could accommodate wireless antennae but were not erected for that primary purpose. Such an interpretation is consistent with actual practice, since wireless facilities are most commonly collocated on traditional cell towers. Moreover, it would make sense that Congress would consider such facilities to be readily available to accommodate minor modifications and collocations without significant additional review, because cell towers have typically already undergone a detailed permitting and zoning process review.

**b. The Commission should avoid an overly broad definition of "base station"**

As with the definition of a wireless tower, the Commission should take care to not adopt an overly broad definition of the term "base station." Even more than the term "wireless tower," the term "base station" is a precise definition that relates specifically to the antenna and associated facilities that are installed on and in conjunction with a tower for providing wireless services. The Commission should follow its existing definition of base station:

> A base station generally consists of radio transceivers, antennae, coaxial cable, a regular and backup power supply, and other associated electronics.[14]

As can be seen, the Commission's own definition is a set of equipment components that *collectively* provides a system for transmission and reception of wireless services that are

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13 Conference Report, H.R. Rep. 112-399, (2012) at 133 (*emphasis* added).

14 *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, including Commercial Mobile Services, Fifteenth Report* 26 FCC Rcd. 9664, 9841, at ¶ 308.

supported by a wireless tower. The District therefore urges the Commission to rethink its tentative proposal to interpret the term base station "to encompass structures that support or house an antenna, transceiver, or other associated equipment that constitutes part of a base station, even if they were not built for the sole or primary purpose of providing such support. As the IAC notes, "a piece of a base station is not itself a base station. A mere equipment or power supply box, for example, is not in and of itself a base station, nor is a structure that supports or houses such boxes."[15]

Given that the term "base station" is not a common synonym for a generic support structure or facility but is more reasonably understood to be a communications term of art referring to the antenna and associated equipment attached to a wireless tower, it is reasonable to assume that when Congress used this term in this context, it assumed that term would be in this narrow sense.

If Congress had intended Section 6409(a) to apply to a broad range of facilities and their individual components, so as to encompass virtually any structure capable of supporting or housing an antenna, transceiver, or other associated equipment, irrespective of whether the structure was solely or primarily constructed to provide such support, it surely would have used broader language than "wireless tower or base station."

**2. All wireless towers or base stations must have *existing*, authorized wireless facilities**

Under Section 6409(a), a wireless tower or base station must be "existing" in order for a proposed modification to be covered. The use of modifier "existing" before the terms "wireless tower" and "base station" not only requires that the wireless tower or base station must be in existence at the time of the collocation or modification application, but also that tower is already

[15] IAC Advisory Recommendation 2013 – 9, at p. 2.

being utilized for approved and authorized wireless antennae under all applicable zoning and land use requirements at the time the modification is sought.

The Commission should reject Verizon's nonsensical suggestion that modifications of base stations "encompass collocations on buildings and other structures, even if those structures do not currently house wireless communications equipment." That suggestion is plainly contrary to the clear statutory language and inconsistent with the intent of Congress. In the District, this could have disastrous results, as it could be interpreted to mean that every building or structure may be open to un-reviewed installations – the White House, the US Capitol Building, the Washington Monument, etc.

First, if the structure does not currently have wireless communications equipment, then it cannot be an "*existing wireless* tower or base station." This interpretation is compelled by the legislative history of Section 6409(a), which refers to "*existing cell* towers."[16] Congress thus clearly contemplated that the statutory provision would apply only to existing wireless towers. If Congress had meant to include structures that could accommodate wireless facilities but were not currently doing so, it would have utilized a broader phrase. Second, such an interpretation would be flatly inconsistent with the underlying assumption of the statute, that minor modifications should be routinely allowed on existing wireless towers and base stations, because these facilities have already undergone a permitting and zoning process review for the installation of a wireless antenna and associated facilities. If there are no existing wireless antennae on a facility, then there would not be prior wireless permit or land use authorization and Section 6409(a) would be wholly inapplicable.

[16] Conference Report, H.R. Rep. 112-399, (2012) at 133 (*emphasis* added).

### 3. A substantial change of the physical dimensions goes beyond a mere change in the size of a tower

The Commission seeks comment on whether and how to define when a modification would "substantially change the physical dimensions" of a wireless tower or base station. As a starting point the Commission proposes to utilize the four-prong test that the Commission has developed to determine whether a collocation will effect a "substantial increase in the size of a tower" for purposes of determining whether an application will be treated as a collocation request under Section 332(c)(7). Under this test, a "substantial increase in the size of the tower" occurs if:

> 1. [t]he mounting of the proposed antenna on the tower would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennae; or
>
> 2. [t]he mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or
>
> 3. [t]he mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable; or
>
> 4. [t]he mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site.

The District respectfully disagrees with the Commission's proposed application of the above tests to determine whether a proposed modification would substantially change the physical dimensions of a wireless tower or base station. As a preliminary matter, the proposed tests incorrectly focus almost exclusively on a substantial increase in size of the tower when that

is not statutory criterion -- whether a modification will "substantially change the physical dimensions" of a wireless tower or base station. As IAC notes, any proper analysis of a change in physical dimensions, whether it is height, weight, bulk, or visual impact, must be considered. Further, consistent with IAC's recommendation, any change in physical dimensions that would (1) violate a building or safety code; (2) violate a federal law or regulation such as an environmental law, a historic preservation law, a FCC RF emissions standard, an FAA requirement, etc.; or (3) violate the conditions of approval under which the site construction was initially authorized, should be considered a substantial change in the physical dimensions.

As IAC observed, the issue cannot be resolved by the adoption of mechanical percentages or numerical rules applicable anywhere and everywhere in the country, but rather must be evaluated in the context of specific installations and a particular community's land use requirements and decisions. This is particularly true in the District of Columbia, where the District's zoning and land use decisions must necessarily reflect a balancing of unique competing interests ranging from District and federal historic preservation rules and regulations to national security and public safety concerns.

The FCC's proposal to allow the mounting of a proposed antenna on the tower if it increased the existing height of the tower by no more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, could effectively eviscerate local zoning authority. In the District of Columbia the problems presented by such an automatic approval requirement are compounded by the fact that zoning height in the District is specifically limited by the federal Height of Buildings Act of 1910.[17]

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[17] Building Height Amendment Act of 1910, 36 Stat. 452 (codified as amended at D.C. Code Ann. § 6-601) ("Height Act").

Similarly, the Commission's proposal to automatically allow a modification of up to four new equipment cabinets without it constituting a substantial change in physical dimensions fails to recognize that such changes may be completely at odds with the conditions that were imposed under the initial grant of approval. For example, the initial grant of a permit for a wireless installation may have been conditioned on the use of stealth facilities and limited the size and number of equipment cabinets. The District must coordinate its zoning and land use decisions with a myriad of federal agencies and the National Capital Planning Commission. As a result, the District has adopted policies, regulations and procedures that meet the needs of all of these interests. Often this requires that the grant of a permit for the construction of a wireless tower and associated facilities contain specific conditions. A modification should not be automatically authorized as not being a substantial change if the proposed modification would not have been authorized under the terms of the original underlying grant of authority.

Moreover, if the term "substantial change" must be defined, with respect to buildings, it should be defined as a very limited percentage increase in the *size of the installation*, not a change in the size of the underlying building. For the reasons stated above, an increase in the heights and widths of antennae, mounting devices, and associated equipment would be of great concern to the District. While collocating an additional antenna at an existing site may not constitute a "substantial change," the addition of multiple antennae or the addition of a larger antenna (or the antennae replacement of an existing antennae with ones of an increased size) may be viewed as a substantial change depending on the facts. Further, a determination of "no substantial change" should require that any new antennae be mounted at the same height and/or within a certain limited distance of existing antennae (i.e. installed on the existing mounting device).

Further, the Commission should also take care that its proposals do not have the unintended consequence of discouraging State and local governments from granting initial authorizations. This could have the unintended consequence of government denials of applications for new facilities out of concern that future changes to such facilities would be automatically approved irrespective of conditions that the government would have sought to impose on the initial application.

### C. Review and Processing of Applications

Noting that Section 6409(a)(1) provides that a "State or local government *may not deny, and shall approve,* any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station," the Commission seeks comments on the extent to which the statutory language leaves State or local governments discretion or authority to deny or condition approval of a request for modification, and whether the Commission should establish timelines for State and local government review of such requests.

#### 1. Conditions imposed upon the initial grant of a permit should continue to apply to subsequent requests to modify such facilities

Section 6409(a) does not require State and local governments to approve a modification of an existing tower or base station, if such modification would not conform to a condition or restriction that the State or locality imposed as a legitimate prerequisite to its original approval of the tower or base station. If a pre-condition or requirement imposed by a State or local jurisdiction was lawful under the approval of the initial grant of authority for the underlying tower and antenna, Section 6409(a) does not suggest that the same conditions would be unenforceable with respect to subsequent requests for modification or colocation. For example, if the District's initial grant of a permit to install a wireless tower and antennae was conditioned

on the facilities meeting specific standards with regard to height, width, bulk, appearance, or other design characteristics intended to camouflage the deployment, it is entirely reasonable and consistent with the statute for the District to require any subsequent request for collocation to meet these same conditions.

Modifications that alter a facility in a fashion inconsistent with a District ordinance or with conditions that were imposed as part of the initial grant of an authorization should be considered a "substantial change" to the structures physical dimensions with respect to the initial grant of permission. To do otherwise would effectively preempt District zoning and land use authority far beyond that which is contemplated under the statute, and would essentially create a giant loophole under which providers could modify facilities at will without regard to conditions imposed as part of the underlying grant of authority.

**2. Federal, State and local building codes and land use laws must continue to apply**

The Commission needs to make clear that any request for modification or collocation must comply with State or local building codes as well as local land use laws. For example, the District should not be required to grant a facilities modification request that would result in an increase in height above the maximum height permitted by an applicable zoning ordinance. As indicated, in the District there are federal statutory height restrictions that cannot be superseded.

Similarly, all requests for modification must be in compliance with general building codes or other laws reasonably related to health and safety. For example, States and localities should be able to continue to enforce restrictions on towers such as load-bearing limits; hardening standards and fall zone/setback requirements, all of which are aimed at preserving public health and safety, as well as maintaining the integrity of the networks. Indeed, maintaining load-bearing and hardening standards may be particularly important for facilities

that are constructed as part of the FirstNet public safety network, since such facilities will by definition need to be operable in emergency conditions and natural disasters.

Finally, modifications and collocation requests involving existing towers or base stations that were approved at the time of construction, but that are no longer in conformance due to subsequent changes to the governing zoning ordinance may require a more detailed review and possible imposition of conditions such as replacement or retrofitting of the underlying structure to conform with the new/revised zoning code provisions.

### 3. Modification requests must continue to be filed with the local jurisdiction who will be responsible for decisions

The District agrees with the Commission's tentative conclusion that Section 6409(a) permits a State or local government, at a minimum, to require an application for a modification to be filed with the applicable State or local government and that such entity will make the threshold determination as to whether the application constitutes a covered request. Applications submitted under Section 6409(a) are not mere pro forma paperwork but rather reflect the role of the applicable State or local government as the threshold decision maker on the questions of whether the requested modification constitutes an "eligible facilities request" and whether it would or would not "substantially change the physical dimensions" of the applicable wireless tower or base station.

Such an approach is entirely consistent with the statutory language providing that the government shall approve "*the application*." This provision clearly indicates that Congress contemplated that applications for modifications would continue to be filed with the State or local government.

### 4. The FCC should not establish a maximum allowable time period for the review of an application for modification

The District urges the Commission not to establish a time limit for the processing of requests under Section 6409(a). There is nothing in the Statute setting out a time period and State and local governments should be able to use their reasonable discretion to review the applications. As indicated above, the District has adopted policies and processes to expedite the review process. Nevertheless, a review process often involves myriad factors and interests and is therefore not amenable to a wooden one-size fits all deadline. Further, consistent with principles of federalism, any State (including the District) adopted time periods for modification review should be deemed to be presumptively reasonable and controlling.

Current District regulations provide for a thirty (30) day review for the State Historic Preservation Office. If a proposed project is referred to the District Historic Preservation Review Board, there is a required Public Notice period, as well as an opportunity for a District Advisory Neighborhood Commissioner to request a deferral if he or she has not been afforded sufficient time to review the project on behalf of his or her constituency. The District recommends that at a minimum the time period should be no less than 90 days from receipt of a complete application. This time period is consistent with the amount of time allowed under the FCC's 332(c)(7) shot clock. The Commission adopting a lesser time period would be problematic for the District's compliance with its own laws and regulations.

If the Commission does adopt a maximum time period for review it must make clear that the time does not commence running until receipt of a complete application for modification, provided that the State or local government notifies the requesting entity within a reasonable period of time that the application is incomplete.

Finally, any time period for review must allow for additional time to undertake a review if the application for modification proposes to install facilities for a different service than for which the tower was originally authorized.

### D. 6409(a) Does Not Apply to State or Local Governments Acting in a Proprietary Capacity

The Commission must make clear that the statutory mandate under 6409(a) and any implementing regulations adopted by the Commission only apply to State and local governments to the extent that they are acting in their governmental role as zoning and land use regulators, and does not apply when such entities are acting in their proprietary capacities as property owners.

A State or local government that elects in its discretion as a property owner to lease space for the construction of a tower or to lease space on a tower that it owns, is under no obligation to allow other, third-party entities to place additional facilities on such towers, let alone is it required to do so without regard to agreed upon contractual specifications.

Moreover, in response to the FCC's question, Section 6409(a) most emphatically does not impose limits on a local government acting in its proprietary capacity to refuse or delay action on a collocation request, just as it does not imply any such restrictions on other private property owners. As the legislative history indicates, Section 6409(a) relates to "zoning law," and does not purport to regulate the use of, or control over, local government property. [18] Section 6409(a) simply has nothing to do with the rights of property owners – be they private entities or public entities.

### E. Remedy and enforcement.

Nothing in Section 6409(a) grants the Commission enforcement authority. The Commission should therefore refrain from adopting possible remedies for violations of Section

[18] Conference Report, H.R. Rep. 112-399, (2012) at 133.

6409(a). As with Section 332(c)(7), claims that a local government has violated Section 6409(a) should be limited to local courts rather than the Commission.

The District urges the Commission not to adopt a "deemed granted" approach, under which a party claiming a violation of Section 6409(a) would have its requested modification deemed granted. Any such action would severely usurp State and local government authority in a manner that is not suggested in Section 6409(a). Moreover, from a practical point of view, State and local governments need to be able to require entities seeking to modify existing facilities or to collocate new facilities would often have permit obligations that they would have to comply with, such as insurance, indemnification bonds requirements. Further, the Commission must not summarily preempt the authority, right, and responsibility of State and local government to conduct its legally required reviews.

## III. IMPLEMENTATION OF SECTION 332(C)(7)

Section 332(c)(7) of the Communications Act, adopted as part of the Telecommunications Act of 1996, generally preserves State and local authority over personal wireless service facility siting. At the same time, certain provisions of 332(c)(7) place substantive limitations on State and local government authority. Section 332(c)(7)(B)(i)(I) states that regulation of the placement, construction, and modification of personal wireless service facilities "shall not unreasonably discriminate among providers of functionally equivalent services . . . ."[19] A second substantive limit provides that a State or local government's siting regulation "shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[20] Further, Section 332(c)(7)(B)(ii) provides that State or local governments must act

[19] 47 U.S.C. § 332(c)(7)(B)(i)(I).

[20] 47 U.S.C. § 332(c)(7)(B)(i)(II).

on requests for personal wireless service facility sitings "within a reasonable period of time."[21] For a remedy, Section 332(c)(7)(B)(v) sets forth a judicial remedy, stating that "[a]ny person adversely affected by any final action or failure to act" by a State or local government on a personal wireless service facility siting application "may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction."[22]

In its *2009 Declaratory Ruling*[23], the Commission determined that it should define the statutory terms "reasonable period of time" and "failure to act" in order to clarify when an adversely affected service provider may file suit in court. Interpreting a "reasonable period of time" under Section 332(c)(7)(B)(ii), the Commission found that 90 days is generally a reasonable timeframe for processing applications to collocate antennae on existing structures, and that 150 days is generally a reasonable timeframe for processing applications other than collocations. The Commission further determined that failure to meet the applicable timeframe presumptively constitutes a failure to act under Section 332(c)(7)(B)(v), enabling an applicant to pursue judicial relief within the next 30 days. The Commission defined these time periods as rebuttable presumptions and recognized that more time may be needed in individual cases. The Commission stated that, in the event an applicant pursues a judicial remedy, the State or local authority would have the opportunity to rebut the presumption that the delay was unreasonable. Ultimately, the Commission stated, the court would find whether the delay was in fact unreasonable under the circumstances of each case.

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21 47 U.S.C. § 332(c)(7)(B)(ii).

22 47 U.S.C. § 332(c)(7)(B)(v).

23 *Declaratory Ruling*, 24 FCC Rcd 13994 (2009), *recon. denied*, 25 FCC Rcd 11157 (2010), *aff'd sub nom. City of Arlington, Texas v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S.Ct. 1863 (2013).

The Commission now seeks comment on whether the Commission's interpretations of Section 332(c)(7) in the *2009 Declaratory Ruling* should be clarified.

### A. The FCC Should Not Reopen its 2009 Declaratory Ruling and Create More Uncertainty

In the *NPRM* the Commission emphatically states, "We do not intend in this Notice to seek comment on or otherwise revisit any aspect of our *2009 Declaratory Ruling*."[24] Consistent with this statement the Commission should not inject confusion and uncertainty into the *2009 Declaratory Ruling* regarding the adoption of a "deemed granted" remedy or the determination of whether an application is complete.

#### 1. Deemed granted

In its *2009 Declaratory Ruling*, the Commission specifically declined to establish a "deemed granted" remedy in cases where a State or local government failed to abide by the time limits established by the Commission. At that time, the Commission recognized that Section 332(c)(7) clearly indicates Congressional intent that courts should have the responsibility to fashion appropriate case-specific remedies. Accordingly, the Commission held that if an alleged failure to act has occurred, an aggrieved party should file with a court of competent jurisdiction within 30 days and that "the court shall hear and decide such action on an expedited basis."[25] The Commission has not suggested that anything has changed in the interim that would justify a change in this position. The Commission should not now revisit this determination.

#### 2. Application completeness.

The Commission notes that while the *2009 Declaratory Ruling* held that a State or local government's period for acting on an application is tolled until the applicant completes its application in response to a request for additional information made within the first 30 days, the

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24 *NPRM* at ¶ 152.

25 *2009 Declaratory Ruling, at ¶ 39.*

Commission did not attempt to define when a siting application should be considered "complete" for this purpose. The Commission now seeks comment on whether to clarify when a siting application is considered complete for the purpose of triggering the *2009 Declaratory Ruling* timeframe and, if so, how that should be determined.

The Commission need not dictate to State or local governments when an application is complete. Most jurisdictions have specific application requirements outlined in local codes or regulations that provide guidance as to what is required in an application. If an applicant ultimately believes that the rules are not clear, or a jurisdiction is not following its rules, or is otherwise unreasonably delaying the process an applicant has a remedy in local court. In such situation, the court is better situated to make a determination, based on the specific facts, as to whether a given application is complete and the jurisdictions application requirements are reasonable.

**B. Use of State or Municipal Property**.

Finally, the Commission raises a question as to whether local ordinances that establish preferences for placing wireless facilities on State or municipal property unreasonably discriminate among providers of functionally equivalent services in violation of Section 332(c)(7)(B)(i)(I), by limiting the siting flexibility of subsequent wireless entrants in a given area.

There are legitimate public interest reasons for allowing such preferences that are not unreasonably discriminatory. Any assertion of whether such a given practice amounts to an unreasonably discriminatory practice depends on case-specific facts, including whether the provider has been treated differently from other providers whose facilities are similarly situated. Such fact specific determinations are best suited to the courts.

## IV. DISTRICT-SPECIFIC HISTORIC PRESERVATION ISSUES WITH SMALL CELL/DAS REVIEW

### A. The District Opposes a Categorical Exclusion

Under the National Environmental Policy Act of 1969 ("NEPA"), new construction of wireless infrastructure often requires a prior determination of whether the proposed facilities will have an environmental impact. Section 106 of the National Historic Preservation Act ("NHPA") imposes similar prior review requirements on wireless facilities that may impact property included, or eligible to be included, in the National Register of Historic Places. In the *NPRM*, the Commission notes that when the current policies and rules for the review of proposed communications facilities were established under NEPA and NHPA, most wireless service was provided through antennae mounted on communications towers at a height of 100 to 200 feet or more and was supported by radio equipment in large cabinets or shelters. As a result, the Commission suggests, the current policies and rules are not necessarily appropriate for the small antennae and compact radio facilities of DAS and microcell systems, which are increasingly being deployed at much lower heights on utility poles, street lamps, water towers, and rooftops, as well as inside buildings, to enhance capacity or fill in coverage gaps. Given these differences, the Commission asks whether DAS and microcell systems should be eligible for a far more streamlined review under both statutes

The District does not believe that the Commission's assumptions regarding DAS and microcell systems are warranted and opposes a categorical exclusion. As an initial matter, the Commission should recognize that, in determining whether a proposed facility has a significant environmental impact, Section 106 does not merely evaluate the potential for *significant e*ffects on historic properties but instead requires an evaluation of "[f]acilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology,

engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places."

Without knowing the number, size, placement, or method of attachment of antennae, wiring and associated equipment, there is no way to determine effects on buildings, historic districts, or other structures (light poles, utility poles, etc.). So, the District cannot agree that there are "minimal environmental effects" that would allow categorical exclusion.

Moreover, categorically excluding DAS or microcell facilities does not take into account potential cumulative effects of such facilities – i.e. one DAS antenna may not have an adverse effect on a historic property, but six of them clustered together might. An exclusion also would not accommodate changes in technology in the future which could introduce different effects on historic resources.

For the same reasons, the District does not find that a determination that small cells and DAS is an "exempted category" under the Section 106 regulations is appropriate. And, a determination that the installation of such facilities is not a federal undertaking is wholly inappropriate. The idea of determining that one type of project (that has been found to have adverse effects in the past) is not an undertaking opens up a proverbial can of worms government-wide, setting a precedent for agencies to parse their projects into undertakings and non-undertakings and effectively undermines the purposes of the NHPA and Section 106 regulations.

The District does not mean to suggest that some DAS/small cells could not be subject to a more streamlined review or eliminated from review via an amendment to one of the existing FCC Programmatic Agreements, a new Programmatic Agreement, a Memorandum of Agreement with the District, or another means. For instance, the DC State Historic Preservation Office ("DCSHPO") would not need to review installations on sites that have not been listed in or

determined eligible for listing in the National Register (the current Colocation Programmatic Agreement is broader in scope and includes installations on any structure over 45 years of age). It is possible that the DCSHPO could also exclude from review installations on utility poles. DCSHPO would have to evaluate street lamps and other structures further to determine applicability of any exclusion provision. The District of Columbia, through the District Department of Transportation owns most lampposts and some utility poles as well as other Public Space appurtenances within the District, so they would need to be consulted.

DCSHPO could also consider excluding from review interior DAS installations when the building is not *individually* listed or determined eligible for listing in the National Registry. But the implications of any such action would have to be researched more thoroughly.

**B. Temporary Towers in the District**

DCSHPO could exempt from Section 106 review temporary towers that are removed after a defined period of time, are not affixed in any way to a building, and that involve *no* excavation unless the area is within an existing District of Columbia right-of-way. The District currently exempts roadways from architectural review.

**C. Leasing**

One problem that comes up repeatedly during the District's Historic Preservation reviews is that carriers sign the leases for rental of roof space before conducting any environmental/zoning/historic reviews. Thus, they are locked in to an agreement even if there are significant, costly, and/or time-consuming challenges to their selected site. Quite often the District gets blamed for the delays, when the provider should have either commenced the review in advance or made the lease contingent on successful completion of any necessary reviews and awarding of a permit.

## V. CONCLUSION

Consistent with the above Comments, the District of Columbia urges the Commission to view Section 6409(a) narrowly and refrain from adopting overly prescriptive regulations and instead defer to the traditional land use authority of State and local governments, subject to review by courts with local jurisdiction.

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